SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 421

DEAN ACHESON, AS SECRETARY OF STATE,
Appellant,

vs.

KIYOKURO OKIMURA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

A. L. WIRIN,
FRED OKRAND,
KATSUO MIHO,
Counsel for Appellees.

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OCTOBER TERM, 1951

No. 421

DEAN ACHESON, AS SECRETARY OF STATE,
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APPELLEE'S STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION, AND MOTION TO DISMISS OR AFFIRM

Appellee above named, for his statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

I

This Court Has Technical Jurisdiction to Hear the Appeal

Inasmuch as the trial court did decide as to the constitutionality of the two statutes involved (8 U. S. C. 801 (c) & (e)), appellee agrees with appellant that this court may review the judgment by direct appeal by virtue of the provisions of 28 U. S. C. 1252 and 28 U. S. C. 2101(a).

Whether the case is of such nature that the jurisdiction of this court ought to be invoked is another question.

II

Probable Jurisdiction Should Not Be Noted Because the Decision Below Is Correct Both on Constitutional and Non-Constitutional Grounds

A

The applicable decisions and authorities sustain the correctness of the lower court's ruling that native born United States citizenship, derived from the Constitution, cannot be taken away by Congress without the consent of the citizen.

See:

United States v. *Wong Kim Ark*, 169 U. S. 649, 703; *Dos Reiss* v. *Nicolls*, 161 F(2d) 860, 862;

"When Camara was born in Massachusetts in 1921, he then became an American Citizen, not by gift of Congress, but by force of the Constitution of the United States (Fourteenth Amendment). United States v. Wong Kim Ark, 1898, 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890. . . .

"It is by no means clear that Congress would have power to deprive a native-born American citizen of his nationality under the circumstances here presented. In United States v. Wong Kim Ark, supra, the court said, 169 U. S. at page 703, 18 S. Ct. at page 477, 42 L. Ed. 890: 'The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away.' By the Act of July 27, 1868, 15 Stat. 223, 8 U. S. C. A. § 800, Congress declared that the 'right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.' The reference, of course, is to voluntary expatriation. Mackenzie v. Hare, 1915,

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239 U. S. 299, 36 S. Ct. 106, 60 L. Ed. 297, Ann. Cas. 1916E, 645, is authority for the proposition that Congress has some legislative power on the subject of nationality and loss of nationality. . . . The Citizenship Act of 1907 was held to be applicable, though the woman had never taken up a residence abroad subsequent to her marriage. As so applied, the Act was held valid. The woman had chosen to marry a foreigner in the face of a statutory provision that such marriage constituted a renunciation of American citizenship—'a condition voluntarily entered into, with notice of the consequences.' But the opinion of the court in Mackenzie v. Hare, 239 U. S. at page 311, 36 S. Ct. at page 108, 60 L. Ed. 297, Ann. Cas. 1916E, 645, was careful to add: 'It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature.'

"From the language of § 401(c) and its legislative history, we think an interpretation which avoids this constitutional question is fully warranted."

cf. *Moser* v. *United States*, 341 U. S. 41.

Just as, even today, there is no right in a citizen to expatriate himself without the consent of the government (e. g. 8 U. S. C. 803; cf. wartime legislation to enable certain American born Japanese to expatriate themselves: 8 U. S. C. 801(i), as recounted in *Acheson* v. *Murakami*, 176 Fed. (2d) 953, 962 (C. C. A. 9), Finding 19),[1] so also, because citizenship is not a one-way street, but rather a two-way highway on which both the citizen and his government have reciprocal rights and obligations (*Ainslee* v. *Martin*, 9 Mass. 454), is there no right in the government,

[1] Accord: *Stranks* v. *Dupont*, 3 Pet. (U. S.) 241, 245; Slaymaker, *The Right of the American Citizen to Expatriate*, 37 Am. L.R. 191, 192; Moore, *A Hundred Years of American Diplomacy*, 14 Harv. L.R. 165, 179; Dutheer, *The Right of Expatriation*, 11 Amer. L.R. 447, 474; Swift, *A System of the Laws of the State of Connecticut*, (Wyndham, Conn. 1795-96, Vol. 1, p. 164); 1 Blackstone, Commentaries, 367 et seq.

save as punishment for crime (*ibid*), to discharge a subject from citizenship against his consent (*ibid*). Indeed, the very cases relied upon by appellant sustain this point. There was, of course, in the *Savorgnan* case (338 U. S. 491) no question as to constitutionality involved.

B

The judgment of the lower court is correct and can be sustained without the constitutional question being reached.

It is axiomatic that if a judgment of a lower court is sustainable on any ground, even though the trial court relied on a different ground, the appellate court will sustain the lower court's judgment.

Oklahoma v. *United States Civil Service Commission*, 330 U. S. 127;

Aetna Casualty & S. Co. v. *Flowers*, 330 U. S. 464;

cf. *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129.

It is equally axiomatic that if a case can be disposed of on a non-constitutional ground, the case will be so decided by this court and the constitutional question will not be reached.

Railroad Commission v. *Pullman Co.*, 312 U. S. 496;

Arkansas Louisiana Gas Co. v. *Dept. of Public Utilities*, 304 U. S. 61;

Coffman v. *Breeze Corp., Inc.*, 323 U. S. 316;

Burton v. *United States*, 196 U. S. 283;

cf. *Sweatt* v. *Painter*, 339 U. S. 629, 631.

The decision below is amply sustainable on non-constitutional grounds, namely, that appellee did not act voluntarily, but rather under duress and coercion and therefore his citizenship cannot be held lost, regardless of the constitutionality of the statute involved.

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Just as the principles suggested above are plain, so is it equally plain that unless the citizen acted voluntarily, he will not be held to have lost his citizenship even if he physically performed the forbidden acts.

Perkins v. *Elg*, 307 U. S. 315, 334:

> "Expatriation is the *voluntary* renunciation or abandonment of nationality or allegiance." (Italics added)

Dos Reiss v. *Nicolls*, 161 F. (2d) 860 (C. C. A. 1):

> "Voluntary action . . . is of the essence of the right of expatriation." On re-hearing (p. 868): "To 'expatriate' oneself clearly implies voluntary action."
>
> Accord: *Attorney General* v. *Ricketts*, 165 F. (2d) 953 (C. C. A. 9);
>
> *Acheson* v. *Murakami*, 176 F. (2d) 953 (C. C. A. 9);
>
> *Podea* v. *Acheson*, 179 F. (2d) 306 (C. A. 2).

Dos Reiss v. *Nicolls*, *supra*, is accepted by this Court in *Savorgnan* v. *United States*, 338 U. S. 491.

The Savorgnan case re-asserts the requirement that the acts resulting in loss of United States citizenship be "voluntarily done" (*Savorgnan* v. *United States*, at p. 500); that the act be "voluntarily and knowingly" done (at p. 502); and that Court specifically points out that where there is "real duress" there is no loss of United States citizenship (at p. 502, footnote 18), citing *Dos Reiss* v. *Nicolls*, 161 F. 2d 860 (C. A. 1st Cir.) *supra; Schioler* v. *United States*, 75 F. Supp. 353 (N. D. Ill.); *In re Gogal*, 75 F. Supp. 268 (W. D. Pa.).

It was on the basis of deciding cases on non-constitutional grounds, if possible, that the *Dos Reiss* case, *supra*, was decided.

The court below made findings of fact, as to appelle herein, not challenged by appellant here, as follows:

"7. In 1939, as some of his Middle School classmates who were United States citizens decided to return to the United States to avoid the Japanese Military Conscription Law, plaintiff joined them, but had proceeded only as far as Kobe, Japan, when his mother overtook him and compelled his return to school. In fulfillment of his parents' desires, plaintiff was graduated from Middle School, and thereafter attended, until mid 1942, Normal School."

"8. At Middle School plaintiff was required to take an officer candidates' examination, and as he rated but a 'B', due to his intentionally poor showing, he successfully avoided being rated as an officer candidate for the Japanese Army."

"11. In mid-June 1942, plaintiff received his notice to report for a Japanese Army physical examination.

"12. Fearing the military police and that he would be shot or imprisoned, plaintiff reported for his physical. He, however, approached the colonel in command and asked to be excused as a United States citizen. This request infuriated the officer who slapped the plaintiff and called him an 'ideological criminal'."

"18. In 1947, in Japan, plaintiff voted because General MacArthur had urged all to vote, and because he had heard that non-voters would lose their rice rations."

Thus it is clear that appellant acted not of his own free will and consent but under such duress and coercion as have resulted in restoration to citizenship of many other young Nisei whose cases have been decided by the courts.[2]

Therefore, since appellant did not act voluntarily, he cannot be said to have lost his citizenship and the case should be affirmed on this ground with no need to consider the constitutional question.

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[2] Some of these cases will be listed below under Point III.

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III

If Probable Jurisdiction Is Noted by This Court, Full and Complete Briefs Should Be Filed and Ample Opportunity for Oral Argument Given

Appellee has pointed out above that this is not a case wherein probable jurisdiction should be noted.. If, however, appellee is incorrect and probable jurisdiction is noted, it is respectfully submitted that appellant's suggestion that the case be disposed of without argument should not be followed.

The problem involved as to whether many, many hundreds of Nisei lost their citizenship during and just after the last war with Japan is of great importance. The question has been litigated in many cases in the lower courts [3] and,

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[3] See, for Example:

Ishikawa v. *Acheson*, 85 Fed. Supp. 1; USDC D Hawaii;
Shibata v. *Acheson*, 86 Fed. Supp. 1; USDC SD Calif.;
Kanno v. *Acheson*, 92 Fed. Supp. 183; USDC SD Calif.;
Motoyama v. *Acheson*, No. 881 USDC Hawaii (Unreported);
Komura v. *Acheson*, No. 10449, USDC SD Cal. (Unreported);
Furukawa v. *Acheson*, No. 8913, USDC SD Cal. (Unreported);
Hosoda v. *Acheson*, No. 10095, USDC SD Cal. (Unreported);
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Ozasa v. *Acheson*, 94 Fed. Supp. 436; USDC SD Cal.;
Hamamoto v. *Acheson*, 98 Fed. Supp. 904; USDC SD Cal.;
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Yamamoto v. *Acheson*, 83 Fed. Supp. 346; USDC D Ariz.;
Arikawa-Tsunashima v. *Acheson*, 83 Fed. Supp. 473, DC SD Calif.;
Onye v. *Acheson*, 91 Fed. Supp. 129, DC D Hawaii;
Yonemura v. *Acheson*, No. 965, DC D Hawaii (Unreported);
Furuno v. *Acheson*, 94 Fed. Supp. 381; (DC SD Calif.);
Masuko Kai v. *Acheson*, 94 Fed. Supp. 383; (DC SD Calif.);
Seki v. *Acheson*, 94 Fed. Supp. 438; (DC SD Calif.);
Rokui v. *Acheson*, 94 Fed. Supp. 439; (DC SD Calif.);
George Yada v. *Acheson*, 94 Fed. Supp. 438; (DC SD Calif.);
Kuwahara v. *Acheson*, 96 Fed. Supp. 38; (DC SD Calif.);
Henry Yada v. *Acheson*, No. 1008-SD; (DC SD Calif., Unreported);
Nakashima v. *Acheson*, 98 Fed. Supp. 11; (DC SD Calif.);
Uyeno v. *Acheson*, 96 Fed. Supp. 510; (USDC D Wash.);

being concerned with the precious right of citizenship, ought not be summarily treated or diposed of. If probable jurisdiction is noted, full opportunity for the filing of briefs and for oral argument should be given.

Moreover, it is to be noted that cases concerning the very statute here involved and related ones are even now on their way to this court, extensions of time within which to file petitions for writ of certiorari having been granted.[4]

WHEREFORE, appellee respectfully submits that the within appeal be dismissed or that the judgment of the District Court for the District of Hawaii be affirmed.

A. L. WIRIN,
FRED OKRAND,
KARSUO MIHO,
Counsel for Appellee.

Kuniyuki v. *Acheson*, 189 F. (2d) 741; on reh. 189 F. (2d) 897; now on petition for Writ of Certiorari;
Furusho v. *Acheson*, 94 Fed. Supp. 1021 (DC D Haw.).

Cf. as to elections in Germany:

Brehm v. *Acheson*, 90 Fed. Supp. 662; (DC SD Tex.);
Wohlmuth v. *Acheson*, No. 520-50 Civ. (DC DC) (On Appeal).

And there are about 50 other cases awaiting trial.

[4] *Acheson* v. *Kuniyuki*, 189 Fed. (2d) 741, on reh. 190 Fed. (2d) 897 (CA 9); *Kawakita* v. *United States*, 190 Fed. (2d) 506 (CA 9); Petition for Certiorari filed Nov. 21, 1951, No. 220.

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